No. 87-1814

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
Petitioner,

v.

COLUMBIA PICTURES INDUSTRIES, INC., *et al.*,
Respondents.

On Petition For Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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TABLE OF AUTHORITIES

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1. Respondents agree that the cable industry's compulsory copyright payments should be derived from "gross receipts . . . for the basic service of providing secondary transmissions of primary broadcast transmitters." 17 U.S.C. § 111(d)(1)(B). Despite the plain language of this governing statutory provision, however, respondents contend that the royalty calculation must sometimes include revenue derived from *non*-broadcast programming. They argue that simplicity of administration and the lack of specific statutory

guidelines to govern an allocation of "gross receipts," dictate the payment of compulsory copyright royalties on the basis of all subscriber revenues produced from program packages combining broadcast and nonbroadcast programming. They erroneously assert that petitioner's interpretation, which would limit the "gross receipts" pool to revenue derived from the broadcast component of such packages, reads the phrase "basic service" out of the statute.

Respondents' argument completely ignores the critical role which petitioner ascribes to the phrase "basic service." As previously explained, Congress included the phrase to emphasize that the royalty calculation should be narrowly construed to include only revenue derived from the fundamental or core service of broadcast retransmission. *See* Pet. at 23. Indeed, it is the only language in the statute which gives effect to the congressional intent (as manifested in the legislative history and observed in Copyright Office regulations) that revenue from "related" services, such as cable installation, *not* be included in the royalty calculation.

2. As a result of the decision below, the value of a cable operator's nonbroadcast programming, which is *outside* the scope of the compulsory copyright license, could be the critical factor in calculating the fees due under that license. In the face of this irrational result, respondents argue that NCTA is seeking too much mathematical precision from the statute. Pointing to congressional interest in creating a "convenient" compensation scheme, they contend that the "DSE factor" is the sole means through which Congress ensured that copyright payments would relate to the value of broadcast programming. But Congress

was concerned with *both* the revenue base and the DSE factor. Even respondents acknowledge that cable operators are permitted to exclude certain revenues from the compulsory copyright calculation. *See, e.g.*, Resp. Col. Pic. Br. at 9 n.8. Such exclusions are fundamentally inconsistent with claims that Congress was indifferent as to the source of the revenue base and believed that the DSE factor would by itself ensure just results.

3. Respondents argue that if Congress wanted cable operators to base the copyright calculation solely on broadcast revenue, it would have provided detailed instructions explaining how necessary allocations should be computed. But the absence of such instructions cannot overcome the plain language of the statute.

The court below acknowledged that when the Copyright Act was adopted

> the initial [cable] package consisted largely of the retransmission of local broadcast signals and of certain rather rudimentary cable originated programming. . . . As a rule, such cable-originated services were not greatly prized by subscribers and whether they were included in the gross receipts pool was a matter of negligible concern. [Pet. App. at 11a.]

Thus, there is nothing surprising or significant in the fact that Congress did not specifically address the non-issue of mixed-tier allocation. The only reasonable construction of the statute today, however, is to allow whatever allocations are required to ensure that compulsory copyright fees remain related to revenue derived from broadcast programming. Revenue alloca-

tions will add a step to the complusory copyright calculation, but with the value of the nonbroadcast component of mixed-tiers now frequently exceeding the value of the broadcast component, "convenience" must give way to "accuracy." The court below and respondents ignore the simple fact that Congress wanted the compulsory copyright payments to be based only on *broadcast* revenue.

4. Departing entirely from the merits of the case, respondents emphasize that an NCTA representative once testified before the Copyright Office against the position now being advanced by petitioner.[1] This alleged inconsistency is, of course, irrelevant to the issue before this Court. Cases of statutory interpretation must be decided on the basis of what *Congress* said, and not on the basis of subsequent statements by private parties.

5. Before reaching the merits of the underlying case, the court below concluded that the statutory

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[1] In fact, NCTA's position has not been as inconsistent as respondents suggest. Several different approaches premised on the need to "allocate" among total subscriber receipts were discussed in the Copyright Office rulemaking. NCTA made a practical judgment in that proceeding to advocate the one approach it thought most likely to gain Copyright Office approval. In his testimony on the "mixed-tier" issue, the NCTA representative stated, "Although it is tempting *and proper* to say that the revenues should be prorated since copyright has already been paid on the non-broadcast services, NCTA believes that this would add undue complication to the process and might well be a subject for dispute and abuse." Court of Appeals Appendix 334 (emphasis added). This statement and the statements cited by respondents simply illustrate NCTA's pragmatic approach to the Copyright Office's rulemaking proceeding and were never intended to have legal significance outside that context.

interpretations of the Copyright Office are "due the same deference given those of any other agency." Pet. App. at 21a. That decision was critical to the Court's resolution of the underlying "substantive" dispute and is in direct conflict with the Second Circuit's conclusion in *Bartok v. Boosey & Hawkes, Inc.* 523 F.2d 941 (2d Cir. 1975). In *Bartok*, the Second Circuit held that "the Copyright Office has no authority to give opinions or define legal terms and its interpretation on an issue never before decided should not be given controlling weight." *Id.* at 946-47. While respondents attempt to distinguish *Bartok*, federal respondents ultimately give up the effort and argue that *Bartok* was wrongly decided. Fed. Resp. Br. at 3 n.10. In so doing, they implicitly acknowledge that *Bartok* is inconsistent with the decision below[2] and that the discrepancy can be resolved only through review in this Court.[3]

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[2] Cases from other courts which grant deference to the Copyright Office only illustrate a split among the circuits. Moreover, the cases cited by resondents all concern ministerial questions of copyright *eligibility*, while this case concerns copyright *enforcement*.

[3] Respondents mischaracterize the Supreme Court cases which they claim resolve the deference issue. In both *Mazer v. Stein*, 347 U.S. 201, 211-13 (1954) and *Goldstein v. California*, 412 U.S. 546, 568-69 (1973), this Court simply noted that the Copyright Office practices were consistent with the Court's decision. In neither case did it indicate that the decisions were reached out of deference to the Copyright Office. Likewise, in *De Sylva v. Ballentine*, 351 U.S. 570 (1956), the Court never reached the issue of whether the Copyright Office, as a government entity, was entitled to deference. It instead summarily dismissed the Copyright Office opinion because it was not a "confident interpretation." *Id.* at 577-78. In short, this Court has never squarely addressed whether the Copyright Office is

6. Respondents argue that this Court should ignore the "separation of powers" problem posed by the decision below because the issue was not previously raised. In fact, the separation of powers issue is inextricably tied to the deference issue, which has been a part of this case from the beginning.[4] In any event, respondents are wrong as to the Court's scope of review. This Court emphatically may consider issues not presented to the court of appeals, particularly where, as here, the case arose in the federal courts,[5] involves important recurring questions,[6] and resolution of the matter is a "pure issue of law."[7]

7. There is no dispute here that interpretation of law for purposes of enforcement is an executive func-

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entitled to deference. Nor has it ever before been briefed on the separation of powers problem posed by granting deference to the Copyright Office or on the impact such deference would have on the operation of the compulsory copyright license.

[4] Petitioner continues to believe that the deference issue should be decided in its favor on the basis of the Copyright Office's institutional bias and lack of enforcement authority. But this Court cannot properly review the decision below to treat the Copyright Office like "any other agency" without also considering the serious separation of powers problem that decision created.

[5] *E.g., Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 697 (1984); *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 320-21 n.6 (1971).

[6] *E.g., Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980). The appropriate allocation of power between the branches is an important and recurring issue that this Court recently decided to review in another context. *United States Army Corps of Engineers v. Ameron*, No. 87-163, *cert. granted*, 108 S. Ct. 1218 (1988).

[7] *Nixon v. Fitzgerald*, 457 U.S. 731, 743 n.23 (1982). *See Mitchell v. Forsyth*, 472 U.S. 511, 527-30 (1985).

tion. And respondents' sole rebuttal to the Copyright Office's previous admission that it is "a department of the Library of Congress *in the legislative branch*,", *see* Pet. at 21, is to point out that the Librarian of Congress is appointed by the President.[8] They contend that this appointment power carries with it removal power and, thus, satisfies the separation of powers violation identified in *Bowsher v. Synar*.[9]

But respondents' argument ignores authority of this Court that limits the President's power to remove officials he has appointed even where "nothing was said in the Act about removal." *Wiener v. United States*, 357 U.S. 349, 352 (1958). Such removal power can be implied only if the affected office is "part of the Executive establishment." *Id.* The Library of Congress was never intended to be "part of the Executive

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[8] Respondent Columbia Pictures also suggests that the Copyright Office's interpretive activities must be valid because they have remained unchallenged for a long time. Resp. Col. Pic. Br. at 20. This nonresponsive observation overlooks the fact that in *Bowsher v. Synar*, 106 S.Ct. 3181 (1986), this Court found a breach of separation of powers requirements on the basis of Congress' "65-year-old removal power that [had] never been exercised and appears to have been all but forgotten until this litigation." *Id.* at 3215 (Blackmun, J., dissenting).

[9] The cases cited for this proposition are irrelevant to the issue of executive power over the Library of Congress. *E.g.*, *Kalaris v. Donovan*, 697 F.2d 376, 395-96 (D.C. Cir.), *cert. denied*, 462 U.S. 1119 (1983) (power to remove extends to inferior executive branch officers but not to members of independent tribunals); *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 896-97 (1961) (Commander of Naval Gun Factory is empowered to dismiss cafeteria cook under authority to exclude civilians from facility); *Ex Parte Hennen*, 38 U.S. (13 Pet.) 230, 258-60 (1839) (district judge has authority to discharge clerk of court).

establishment." To the contrary, the Library's statutory authorization is set forth in the midsts of the United States Code Title dealing with "The Congress," and it has specific responsibilities to serve Congress, 2 U.S.C. §§ 166, 171(1), to report annually to Congress on its activities "including the copyright business," *Id.* § 139, and to provide to Congress "a detailed statement of all receipts and expenditures on account of the Library and said copyright business." *Id.*

With the exception of the interpretive activities at issue here, the Library's institutional responsibilities are to Congress, and both the Librarian of Congress and the Register of Copyrights are "obvious congressional agents." *Bowsher*, 106 S. Ct. at 3215 n.25 (Stevens, J., concurring). As a result, the decision below to defer to the Copyright Office, as if it were "any other [executive] agency," leaves that Office in flagrant violation of fundamental separation of powers requirements.

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For the foregoing reasons, and those in the Petition, this Court should grant the writ and reverse the decision below.

Respectfully submitted,

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